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# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 305

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HEFFRON SISSON, JR.

~~ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MASSACHUSETTS~~

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the United States District Court for the District of Massachusetts (A. 248-264) is reported at 297 F. Supp. 902.

### JURISDICTION

On April 1, 1969, the district court entered an order granting appellee's motion in arrest of judgment, on the ground that the criminal statute in question (50 U.S.C. App. 462), which makes it a crime, *inter alia*, to refuse to submit to induction as ordered, could not constitutionally be applied to appellee. A notice of appeal to this Court was filed in the district court on April 23, 1969. On October 13, 1969, this Court entered

an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (A. 268). Under 18 U.S.C. 3731, this Court has jurisdiction, on direct appeal, to review a decision granting a motion in arrest of judgment based upon the invalidity of the statute on which the indictment is founded. See *United States v. Green*, 350 U.S. 415, and the discussion *infra*, pp. 29-36.<sup>1</sup>

#### QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over the instant direct appeal.
2. Whether the Selective Service laws may constitutionally be applied to require induction into the Armed Forces of one who is a non-religious conscientious objector to participation in the Vietnam conflict.

#### STATUTES INVOLVED

Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 462(a)) provides, in pertinent part:

Any \* \* \* person \* \* \* who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under \* \* \* this title \* \* \*, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for

<sup>1</sup> In its order postponing consideration of the jurisdictional question, the Court requested the parties to discuss "not only the issue of jurisdiction under the 'arresting a judgment' subdivision of 18 U.S.C. § 3731, but also the questions of whether jurisdiction exists under either the 'motion in bar' subdivision or the 'decision \* \* \* setting aside or dismissing' subdivision of 18 U.S.C. § 3731 (A. 268).

not more than five years or a fine of not more than \$10,000, or by both \* \* \*.

Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(j)) provides, in pertinent part:

Nothing contained in this title \* \* \* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. \* \* \*

#### **STATEMENT**

An indictment returned in the United States District Court for the District of Massachusetts charged that appellee knowingly and wilfully refused to comply with the order of his local Selective Service board to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (A. 6).

Prior to trial appellee moved to dismiss the indictment, principally on the ground that there was no constitutional authority to conscript him to serve in an undeclared war. He also contended that the hostilities in Vietnam violated international law and alleged, as a proposed defense, that he reasonably believed the Vietnam conflict to be illegal (A. 10; see A. 30-38). In an affidavit in support of his motion to dismiss, appellee stated that, at the time he refused to submit to induction and at the time of the motion

he believed, on the basis of his knowledge of the Vietnam conflict, that he could not participate in it without doing violence to the dictates of his conscience (A. 43).

In a written opinion (A. 80-86; 294 F. Supp. 511) which was later amplified (A. 87-89; 294 F. Supp. 515), the district court determined that appellee had the requisite standing to raise these issues, but that it had no jurisdiction to decide the "political questions" whether a congressional declaration of war was necessary to the constitutional validity of American military activities in Vietnam and whether the conduct of the Vietnam hostilities violated international law. The court also ruled that it would not constitute a defense to the charge of intentional refusal to submit to induction that appellee personally regarded the Vietnam conflict as illegal or unjust.

After a trial at which appellee testified, the jury returned a verdict of guilty. Appellee made a motion in arrest of judgment (A. 241-243), which was subsequently amended (A. 244-247), in which he reasserted the grounds of his earlier motion to dismiss.<sup>2</sup> In his motion in arrest appellee stated that he "cannot qualify as a 'conscientious objector' within the meaning of the Military Selective Service Act of 1967, because he is not a pacifist and, in any event, his convictions that the Vietnam war is illegal, immoral and unjust are not based on 'religious training and belief'" (A. 242, 245).

<sup>2</sup> He also claimed that if the court could not adjudge the relevant issue of the legality of the Vietnam conflict, then the trial violated due process (A. 245).

The district court, in granting the motion (A. 248-264), noted that "in substance the case arises upon an agreed statement of facts" (A. 250). It took as the predicate for its opinion that it was undisputed that appellee was sincerely and conscientiously opposed to the Vietnam conflict, based on his moral convictions, educational training, extensive reading of reports about and comments on the Vietnam situation, and the degree to which he had familiarized himself with the U.N. Charter, the charter and judgments of the Nuremberg Tribunal, and other domestic and international matters bearing upon the American involvement (A. 251). The court reiterated its prior rulings that appellee had standing to challenge the indictment on the grounds advanced although he had filed no conscientious objector claim with the Selective Service System (A. 249), but that the court had no jurisdiction to decide the political questions whether the military actions of the United States in Vietnam require a declaration of war by Congress or violate international law (*ibid.*).

The court assumed *arguendo* that a conscientious objector, religious or otherwise, may constitutionally be conscripted for some kind of military service in peace or war, and that all persons, including conscientious objectors, could constitutionally be conscripted even for combat service "in time of declared war or in the defense of the homeland against invasion" (A. 256-257). It held, however, that since appellee was sincere and his conscientious objection to participation in the Vietnam conflict was not unreasonable, he

had a valid claim to be "constitutionally exempted from combat service in the Vietnam type of situation" (A. 259). It was of the view that the magnitude of appellee's conviction had to be balanced against the need of the government to have persons in appellee's circumstances engage in combat service in Vietnam. Finding that there was not a "national need for combat service from [appellee] as distinguished from other forms of service by him" (A. 258), the court concluded that the Military Selective Service Act of 1967, as applied to appellee, violated the Free Exercise and Due Process Clauses of the First and Fifth Amendments, respectively, insofar as it sought to require him to be inducted upon the possibility of serving in a combatant capacity in a foreign war to which he was a conscientious (but not religious) objector (A. 261). Alternatively, the court held that Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(j)), as applied to appellee, violated the Establishment Clause of the First Amendment, in that it unreasonably discriminates between religious and non-religious conscientious objectors (A. 263).<sup>8</sup>

<sup>8</sup> The court, in characterizing this claim as merely a reiteration of appellee's "older contention" (A. 248-249), apparently accepted his position that the Establishment Clause argument was implicit in the original motion to dismiss the indictment, in view of his assertion in connection therewith of a "right of conscience." In referring to appellee as a "conscientious objector" rather than a "selective conscientious objector," the court apparently relied on its finding that a selective conscientious objector has a claim of a magnitude that "is not appreciably lessened if his belief relates not to war in general, but to a particular war" (A. 258).

Accordingly, the court granted appellee's motion in arrest of judgment (A. 264).

#### SUMMARY OF ARGUMENT

##### I.

In its order postponing jurisdiction, the Court directed the parties, in relation to the appealability question in this case, to discuss all the various branches of the Criminal Appeals Act by which appeals may be taken directly to this Court. We have concluded that an appeal is not authorized under either the "motion in bar" or "decision \* \* \* dismissing" provisions of the Act, since the ruling in this case was made after jeopardy had attached. The language, legislative history and consistent construction of the Criminal Appeals Act since 1907 indicate that Congress did not intend to give the United States a right of appeal to this Court from decisions—other than on a motion in arrest of judgment—rendered after jeopardy has attached, in the sense that a jury had been sworn to try the case.

It is, however, our position that this case is appealable to this Court under the "motion in arrest" language of 18 U.S.C. 3731. Appellee's motion, which the trial judge granted, purported to be and was treated by the district court as a motion in arrest of judgment. It was submitted, in accordance with the time spelled out in Rule 34, F.R.Crim.P., for the making of such motions, after the jury's verdict of guilty. The ground on which the motion rested—that the indictment did not charge an offense—similarly fell within the tradi-

tional scope of such motions, as expressly recognized in Rule 34, F.R.Crim.P.

The sole basis for question as to whether the present holding comes within the "motion in arrest" provision of the statute is that the trial judge utilized, as part of the circumstantial predicate for his legal rulings, the undisputed fact, which did not appear in the indictment, that appellee is a selective, non-religious conscientious objector ~~to~~ in the Vietnam conflict. In our view this use of facts, not as an independent ground of decision but only to provide the framework for the trial court's legal rulings on the sufficiency of the indictment, did not remove the instant decision from the class of appealable decisions rendered on a motion in arrest of judgment. This Court has recognized that a stipulation of facts by the parties in a criminal case may be treated, like a bill of particulars, as supplementing the indictment, so that a ruling based on those facts is appealable to this Court where the basis of the decision is the invalidity or construction of the underlying statute. That principle is applicable here. Moreover, each aspect of the court's dual holding in this case—that 50 U.S.C. App. 462(a) cannot be applied, under the Free Exercise and Due Process Clauses, to require military service of one like appellee who is a conscientious objector to the Vietnam conflict and that 50 U.S.C. App. 456(j), the conscientious objector provision, constitutes an establishment of religion—meets the requirements of the Criminal Appeals Act for appeal to this Court—viz., that the decision be "based upon the invalidity or construction of the statute upon which the indictment is founded." It follows that this Court has jurisdiction over the appeal.

## II

Appellee, a non-religious and sincere objector to participation in the Vietnam conflict, refused to report for induction into the Armed Forces as ordered, and was subsequently prosecuted for violation of that order. The district court found that there was a substantial possibility that he would be sent to fight in Vietnam. Then, striking a balance between appellee's right to individual liberty and the court's appraisal of need for combat service from persons like appellee in "a campaign fought with limited forces for limited objects with no likelihood of a battlefield within this country and without a declaration of war," the court afforded appellee a constitutional immunity from conscription generally at a time when he might be sent to Vietnam (A. 258).

1. Since appellee's induction would not necessarily have resulted in his ever being sent to Vietnam, the district court acted prematurely in deciding the case on a set of circumstances which may never occur. In deciding a constitutional issue on anticipated events, the district court violated well established rules that a court should not anticipate questions in advance of the necessity to decide them, nor formulate a rule of constitutional law broader than that necessitated by the precise facts of the case before the court.

2. The district court exceeded the limits of judicial power in undertaking a "balancing approach" to limit the exercise of the plenary congressional power to raise and support armies. While Congress may not act arbitrarily in determining who shall serve in the

Armed Forces, the right to determine whether this country needs men for military service is vested in Congress, not the courts. It is not within the province of the courts to determine whether a particular foreign policy is wise or unwise, or whether or not there is sufficient national need for a particular number of men to be in a certain place at a specific time. This determination is the very essence of a "political question," and is thus unsuited for judicial scrutiny. The courts should not substitute their own determination of the national need for military manpower for the determination made by the coordinate branches of government charged under the Constitution with the responsibility for making and implementing that decision.

3. Although the district court held that to prefer religious conscientious objectors over non-religious objectors violated the Establishment clause of the First Amendment, that constitutional provision is not actually involved. So far as the "selective" conscientious objector is concerned, Congress has made no distinction between religious and non-religious motivations. A person who seeks exemption based on a belief that a particular war is wrong is denied the exemption whether his belief is religiously or non-religiously founded. Since Congress treats religious and non-religious selective conscientious objectors equally, and no preference is afforded to the religious, "selective" conscientious objector, no claim under the Establishment Clause can properly be made here.

Nor can it reasonably be argued that, by requiring appellee's induction into the Armed Forces, Congress

has violated the Free Exercise Clause of the First Amendment. Freedom to believe does not justify disobedience to a valid law, and the Free Exercise Clause does not mandate that a conscientious objector be immune from conscription. There is no precedent for construing the Free Exercise Clause as embracing a general right of conscience unrelated to religious underpinnings. To so construe that provision would logically lead to a situation destructive of orderly government, since it would have application in a wide variety of circumstances, not just in regard to conscription.

4. Since no First Amendment issue is presented by this case, the sole issue to be decided is whether Congress has acted arbitrarily in granting exemption from combat duty to those who oppose all wars and denying exemption to those who wish to reserve the right to select the wars in which they will fight. There is a rational basis to grant an exemption to the former while denying exemption to the latter. Opposition to only a particular war necessarily involves a political judgment as to the propriety of governmental action in a particular place at a particular time. Congress may validly conclude that there is a qualitative difference between this type of belief and the attitude of a person who believes it is wrong to kill for any purpose at any time.

### III

The issue as to whether Congress has "established" religion by granting exemption to religious "pacifist" objectors, while denying it to non-religious "pacifist"

objectors, is not presented on the facts here. That issue is before this Court in *Welsh v. United States*, No. 76, this Term. Assuming, *arguendo*, that the petitioner there prevails, such a decision would nevertheless not control the result in this case. To hold otherwise would be to violate the well established rule that an individual cannot attack a statute on the ground that it might be unconstitutional as applied to others.

#### **ARGUMENT**

##### **I. THIS COURT HAS JURISDICTION OF THE APPEAL**

In its order of October 13, 1969, the Court stated:

Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. \* \* \* In addition to the questions presented on the merits, counsel are requested to discuss in their briefs and oral arguments, not only the issue of jurisdiction under the "arresting a judgment" subdivision of 18 U.S.C. § 3731, but also the questions of whether jurisdiction exists under either the "motion in bar" subdivision or the "decision \* \* \* setting aside or dismissing" subdivision of 18 U.S.C. § 3731.

In substance, we adhere to the position taken in our Jurisdictional Statement (and concurred in by appellee) that jurisdiction over the instant appeal properly lies to this Court under the "arresting a judgment" provision of 18 U.S.C. 3731. With respect to the "motion in bar" and "decision \* \* \* setting aside or dismissing" subdivisions of the statute, it is our view that jurisdiction in this Court does not exist,

since the language of the statute, its legislative history and long-standing construction indicate that Congress did not afford the government a right to appeal to this Court from rulings—other than those granting motions in arrest of judgment—rendered after jeopardy has attached, even though to do so would not violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution.

The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

These provisions have come down unchanged in substance from the original Criminal Appeals Act en-

acted on March 2, 1907 (34 Stat. 1246). That statute provided:

\* \* \* That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The Act was amended in 1928 so as to abolish review by writ of error and substitute the right of appeal (45 Stat. 54). In 1942 the Act was further amended to enable the United States to appeal to the courts of appeals from certain types of dismissals or rulings on motions in arrest of judgment, not here pertinent except as discussed below. See generally *United States v. Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9). In addition, the 1942 amendment increased the appellate jurisdiction of the Supreme Court by including cases involving informations as well as indictments (56 Stat. 271). The present form of the Act is the result of

a 1948 amendment which changed the wording to conform to Rule 12 of the Federal Rules of Criminal Procedure (as promulgated in 1946),<sup>4</sup> but did not alter the scope of review (62 Stat. 844; see Reviser's Note to 18 U.S.C. 3731).

Thus, the provisions of the 1907 Act and its legislative history are the crucial focus for any inquiry as to the scope of the right of appeal to this Court which Congress intended to confer upon the United States under the current Criminal Appeals Act. This, to a considerable extent, is the cause of the technical problems which plague the interpretation of the statute. The statute was passed at a time when the range of federal prosecutions was considerably narrower and the technical niceties of pleading were accorded more significance than at present. In particular, as recent experience in Selective Service cases illustrates, the necessity of review of administrative records in connection with a criminal prosecution—an outgrowth of the tremendous expansion of administrative agencies since 1907—gives rise to situations which do not readily fit into the categories of pleadings recognized at the time the Act was first passed. Nevertheless, until such time as Congress decides to amend that statute,<sup>5</sup> the Act as passed in 1907 defines the limitations of the

<sup>4</sup> Thus, for example, the phrase "motion in bar" was substituted for the common law expression "special plea in bar."

<sup>5</sup> From time to time the Department of Justice has suggested legislation to amend the Criminal Appeals Act so as to eliminate the various gaps—which we believe to be unwarranted as a matter of policy—in the right of the United States to take appeals in criminal cases, particularly with reference to post-jeopardy rulings not going to issues of fact. A pending bill to allow the government to appeal from any ruling by a district

government's right to appeal to this Court, and the government and the Court must perform function within those limitations.

The problems that arise under the statute are of two kinds: (1) the nature of the decision of the district court from which appeal is sought—i.e., whether it is within the class of cases in which appeal has been authorized (e.g., demurrer, plea in bar, and arrest of judgment); and (2) whether the decision was rendered at a time, in relation to jeopardy of the defendant, when appeal has been sanctioned. We discuss the second question first because, in our view, the answer to that question precludes the government from relying upon anything other than the motion in arrest of judgment clause as a basis for appeal in the instant case.

*A. Congress, in the Criminal Appeals Act, Apparently Intended to Confine Appeals By the Government, Except as to Motions in Arrest of Judgement, to Situations in which Jeopardy Had Not Attached, Even Though a Defendant Who Moved for Dismissal During Trial Could Constitutionally Be Subject to Retrial.*

1. With respect to judgments granting motions in bar, the statute gives the government a right of appeal terminating or dismissing a prosecution, to the extent permitted by the Constitution, which also would amend the statute to provide that all appeals be taken to the court of appeals save where the sole ground for the termination of a prosecution is the invalidity of the underlying statute, was introduced in the House of Representatives on October 29, 1969, by Representative McCulloch. H.R. 14588, 91st Cong., 1st Sess.; see 115 Cong. Rec. H10274.

peal to this Court "when the defendant has not been put in jeopardy." For most purposes, a defendant is deemed to have been put in jeopardy at the point where the jury is sworn to try him (or an equivalent point is reached in a non-jury case). *E.g., Downum v. United States*, 372 U.S. 734, 737. However, when a defendant secures dismissal of an indictment or succeeds in having a verdict or judgment set aside, the constitutional provision against double jeopardy does not bar a subsequent trial. *United States v. Ball*, 163 U.S. 662; *United States v. Tateo*, 377 U.S. 463, 466-467. The question in this phase of the case is whether "put in jeopardy" should be read literally, or should be interpreted as applying only to circumstances where the defendant cannot be retried without violating the Fifth Amendment's Double Jeopardy Clause.

The Department of Justice has consistently taken the view that the plea in bar section limits the government's right of appeal to the granting of such pleas before a jury has been sworn. Soon after passage of the original Act, the 1907 Report of the Attorney General urged that the omission in the Act of a governmental right to appeal from post-jeopardy rulings be remedied by revising the Act so as to require counsel for the defendant to raise and argue questions of law prior to the time when jeopardy attached. See Rep. Atty. Gen. (1907), p. 4. He said:

By the act approved March 2, 1907 (34 Stat. 1246), an appeal is allowed to the United States in criminal cases, but substantially only as to

the constitutionality or construction of Federal statutes and only when the question is presented, in some form, on a preliminary issue of law. \* \* \*

Recognizing the constitutional obstacles which embarrass the grant of an appeal when the error complained of is committed after jeopardy, I suggest that provision be made for raising compulsorily all questions of law which can be appropriately raised before that moment comes.

In *United States v. Zisblatt*, 172 F. 2d 740 (C.A. 2), the government appealed to the court of appeals from a post-verdict judgment granting a motion to dismiss the indictment as barred by the statute of limitations. The government's theory there was that this was the granting of a motion in arrest of judgment, but was not appealable to the Supreme Court because not based on the construction or invalidity of the underlying statute. The court of appeals held that the district court's ruling was not an arrest of judgment but the granting of a special plea in bar. Recognizing that the Criminal Appeals Act contained language permitting the government to appeal from rulings on special pleas in bar only "when the defendant has not been put in jeopardy," the court acknowledged that there "is, therefore, a good argument for saying that no appeal lies to the Supreme Court" (*United States v. Zisblatt, supra*, 172 F. 2d at 742). Without discussing the legis-

lative history of the statute, the court concluded (*id.* at 742-743):

On the other hand, there is also a more than plausible argument for saying that the Criminal Appeals Act, being a remedial statute, was intended to give an appeal to the prosecution in all cases where that was constitutionally possible; and that the Supreme Court may not read literally the clause, which limits its powers to cases where the defendant had "not been put in jeopardy," but that on the contrary it may think that the clause only meant that it should not intervene when the Constitution forbade intervention.

After determining that the Constitution would not prohibit the government from appealing the district court's ruling, the court of appeals certified the case to this Court. The then Solicitor General, being of the view that the statute barred appeals from the granting of motions in bar after jeopardy had attached, moved to dismiss the appeal, and the appeal was dismissed (336 U.S. 934). The Department of Justice has thereafter adhered to that position, and the government has never sought to appeal in these circumstances.

In the light of the request by the Court for discussion of the various aspects of the Criminal Appeals Act, we have reexamined the legislative history of the 1907 statute. The progress of the bill through Congress is summarized in Frankfurter and Landis, *The Business of the Supreme Court*, pp. 113-119

(1928); see also Friedenthal, *Government Appeals in Federal Criminal Cases*, 12 Stan. L. Rev. 71 (1959).<sup>6</sup>

<sup>6</sup> Frankfurter and Landis (*supra*, pp. 117-119, nn. 67-69, 71) summarizes the legislative history of the 1907 Act as follows: "The bill was introduced into the House by Jenkins on Feb. 22, 1906. 40 CONG. REC. 2881. It was reported from committee on Mar. 7, 1906, by Nevin. *Ibid.* 3494. See HOUSE REPORT, No. 2119, 59th Cong., 1st Sess., Ser. No. 4906. The bill appears in full in 40 CONG. REC. 5408. It provided that the United States should have the same right of review by writ of error in a criminal case as is accorded the defendant, providing, however, that even if there was error, a verdict for the defendant should not be set aside. The bill passed the House on April 17, 1906, without debate and division. *Ibid.* 5408.

"The bill was reported by Nelson from the Senate Judiciary Committee on May 29, 1906. 40 CONG. REC. 7589. The report offered a substitute bill in lieu of the House bill. See SEN. REP., No. 3922, 59th Cong., 1st Sess., Ser. No. 4905. The Senate bill permitted writs of error from the circuit and district courts to the Supreme Court or the circuit courts of appeals (according to the provisions of the Act of 1891) from a decision quashing an indictment, sustaining a demurrer to an indictment or any count thereof, from the arrest of a judgment of conviction on the ground of insufficiency of the indictment, and from a decision sustaining a special plea in bar when the defendant has not been put in jeopardy. On June 1, 190[6], upon objection of Teller of Colorado, the bill was passed over. 40 CONG. REC. 7684. On June 19 an amendment proposed by Nelson prohibiting a verdict for the defendant from being set aside even if there was error, was adopted. *Ibid.* 8695. On June 23 upon Spooner's suggestion, the amendment was reconsidered and disagreed to. *Ibid.* 9033. On the same day further consideration of the bill was prevented by objection. On June 25 upon Mallory's objection, the bill was again passed over, and the session closed without action by the Senate. *Ibid.* 9122.

"In the second session the bill, after being recommitted to the Judiciary Committee, was reported out on Jan. 29, 1907. 41 CONG. REC. 1865; SEN. REP., No. 5650, 59th Cong., 2nd Sess., Ser. No. 5060. The bill was amended by a provision requiring that all objections to the sufficiency of the indictment in matters of form should be made and determined prior to the im-

The critical discussions pertaining to the features of the Act which are at issue in the instant case occurred during the three-day debate in the Senate on the bill

paneling of the jury. 41 Cong. Rec. 2190. The bill was debated by the Senate for three days. *Ibid.* 2190-2197, 2744-2763, 2818-2825. Hale of Maine and Whyte of Maryland resisted the bill outright and declared themselves in favor of the 'traditional' provisions of the common law. Whyte's amendment to strike out all the provisions of the bill save that permitting an appeal from a judgment sustaining a demurrer to an indictment was defeated by a vote of 40-14. *Ibid.* 2195. Rayner of Maryland proposed an amendment providing that even if there was error, a verdict or judgment for the defendant should not be set aside. Senator Spooner curtly analyzed the proposal, saying: 'If it means anything it means too much.' *Ibid.* 2761. Consequently the phrase 'or judgment' was withdrawn, and Rayner's amendment with the omission of these destructive words was adopted. *Ibid.* 2819. Carter of Montana succeeded in getting the adoption of an amendment requiring an appeal to be taken within thirty days and diligently prosecuted. *Ibid.* 2194. Newlands of Nevada offered an amendment permitting the defendant to be released on his own recognizance, which Piles of Washington further amended by adding 'in the discretion of the presiding judge.' *Ibid.* 2195. The Piles amendment was adopted by a vote of 29 to 23, and the Newlands amendment by 33 to 21. *Ibid.* 2196, 2197. Upon Spooner's suggestion Nelson secured a reconsideration of the Piles amendment and its rejection. *Ibid.* 2821. Clarke of Arkansas secured the adoption of an amendment restricting appeals from decisions quashing or sustaining a demurrer to an indictment or arresting a judgment of conviction for insufficiency of the indictment to cases involving the validity or construction of the statute upon which the indictment was founded. *Ibid.* 2822. The bill with these amendments is found in full in 41 Cong. Rec. 2823. Culberson and Spooner suggested further amendments to the last clause of the bill, which was finally, however, struck out. *Ibid.* 2824, 2825.

\* \* \* \* \*

"The bill passed the Senate without division on Feb. 13, 1907, and was printed upon Spooner's motion. 41 CONG. REC. 2834. Its reception in the House brought an attack from its original

reported from the Judiciary Committee on January 29, 1907—a bill similar, as to the problems involved here, to that finally passed by the Congress (see 41 Cong. Rec. 2190-2197, 2745-2763, 2818-2825).

So far as the special plea in bar section of the Act is concerned, we think the legislative history is reasonably clear that Congress did not intend for an appeal to be allowed if the ruling was made after a jury had been assembled to try the case. Senator Bacon, in first introducing the measure, indicated that the phrase "when the defendant has not been put in jeopardy" in the "motion in bar" subdivision was placed there "out of an abundance of caution" (41 Cong. Rec. 2191). Senator Patterson, another proponent of the measure, had at one point indicated that he thought there could not be a double jeopardy problem with respect to a plea in bar because "[a] special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses of which he is charged," and referred specifically to an antitrust case where Chicago packers had been freed on the ground that they had been in-

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sponsors, but a motion to refer it to the Judiciary Committee was adopted. *Ibid.* 3044-3047. On Feb. 22, 1907, the House disagreed to the Senate bill, proposed a conference and named Jenkins, Birdsall, and De Armond as conferees. *Ibid.* 3647. The Senate named Nelson, Knox, Bacon. *Ibid.* 3623. The conference committee, aside from mere formal changes, revised the bill so as to divest the circuit courts of appeals of all review and invest this in the Supreme Court alone. Review was also to be only by writ of error. See HOUSE REPORT, No. 8113, 59th Cong., 2nd Sess., Ser. No. 5065. The report was agreed to by the Senate on Feb. 26 and by the House the following day. 41 CONG. REC. 3994, 4128."

duced to give information to the government (41 Cong. Rec. 2753). Senator Nelson, a leading spokesman for the measure, was, however, very specific that the proposed measure would not have permitted an appeal in the Chicago case because in that case "a jury was impaneled," and the question whether the defendants were entitled to immunity because they had given the information was submitted to the jury. He then went on to say (41 Cong. Rec. 2757) :

A case may occur where a special plea in bar is interposed and the Government does not deny the fact pleaded in the special plea in bar, admits the truth of it, but says in its answer or demurrer to the plea in bar that it constitutes no bar. In that case, where a plea in bar is decided without the intervention of a jury, there has been no jeopardy \* \* \*. We expressly provide in the fourth paragraph that in the case of a special plea in bar where the defendant has been put in jeopardy no appeal lies.

Senator Nelson elsewhere said that in the plea in bar section it was made clear, "out of extreme caution," that "where the defendant has been put in jeopardy he can not be reindicted" (41 Cong. Rec. 2756).

Considering the fact that the right of appeal by the government was an innovation in federal criminal law when the Act was passed, and that the double jeopardy question was of great concern to the senators, we think that it is fair to conclude that Congress intended to avoid possible constitutional problems by permitting an appeal from the grant of a pléa in bar only if the issue were determined prior to a jury's being

sworn, and that the provision should be construed accordingly.'

2. The clause granting an appeal from a decision on demurrer, based on the ~~unconstitutionality~~ or construction of the statute, does not in express terms contain the phrase "when the defendant has not been put in jeopardy." Nevertheless, since the enactment of the statute, the Department of Justice has thought that it had no right of appeal from the granting of a demurrer after a jury had been sworn. See Report of the Attorney General, *supra*, pp. 17-18. In *United States v. MacDonald*, 207 U.S. 120, decided seven months following the passage of the 1907 Act, in which the constitutionality of the Act was challenged for the first time (in the context of a case arising under the demurrer provision), Justice Holmes, writing for a unanimous court, stated (207 U.S. at 127):

"For this reason there is no occasion to reach in this case the question, on which members of this Court have expressed differing views, whether a "motion in bar" includes any judgment "which will end the cause and exculpate the defendant." See *United States v. Mersky*, 361 U.S. 431, 441 (Mr. Justice Brennan, concurring). The less expansive position of the United States which was advocated in *Mersky* and adopted by Justices Frankfurter, Harlan, and Stewart (dissenting opinion *id.* at 452-453, 455-458) is based upon the common law meaning of the parent statutory term "special plea in bar"; that is, a plea by way of confession and avoidance which does "not contest the facts alleged in the declaration, but relie[s] on new matter which would deprive those facts of their ordinary legal effect. \* \* \* It set[s] up affirmative defenses which would bar the prosecution" (*id.* at 457). The legislative history of the 1907 Act indicates that the Congress was using the term in its common law meaning. See statements of Senators Patterson and Nelson quoted in the text, *supra*, pp. 22-23. (

The defendant argues that the United States cannot be allowed a writ of error in a criminal case like this. We do not perceive the difficulty. No doubt of the power of Congress is intimated in *United States v. Sanges*, 144 U.S. 310. If the Fifth Amendment has any bearing, the act of 1907 is directed to judgments rendered *before the moment of jeopardy is reached*. \* \* \* [Emphasis added.]

The legislative history of the 1907 Act is far more confusing on this aspect than on the plea in bar situation. The senators, both proponents and opponents of the bill, were familiar with the case of *United States v. Ball*, 163 U.S. 662, holding that a person who has a verdict against him set aside may be tried anew for the same offense on the theory that he arrested or waived the former jeopardy (41 Cong. Rec. 2193, 2752, 2756). They also seemed to accept the view then prevalent that, to sustain a plea of double jeopardy, the defendant had to be put to trial under a "valid" indictment (41 Cong. Rec. 2192, 2746, 2751, 2756). Senator Nelson, for example, quoted cases which he said "show that the proper criterion in all these cases as to whether the defendant has been put in jeopardy or not is whether, if in any form before there has been a trial and a verdict the indictment is held defective and bad because it does not charge a criminal offense, the defendant can be reindicted, rearrested, and tried over again"; he said that the bill except for the jeopardy clause was limited to those cases "where the defendant can be reindicted, rearrested, and retried for the same offense" (41 Cong. Rec. 2756). There was agreement,

even by Senator Rayner, the most active opponent of the measure, that if a judge arrested judgment, the defendant could be tried anew (41 Cong. Rec. 2747). When questioned if such a person had not been in jeopardy, Senator Rayner said such a person "has never been in jeopardy, upon the principle that he has arrested the jeopardy by his own motion." Senator Knox then pointed out that a demurrer and motion in arrest were actions of the defendant (41 Cong. Rec. 2748).

Senator Knox also said later (41 Cong. Rec. 2752):

\* \* \* This bill allows to Government an appeal only from—

Defendant's motion to quash or set aside indictment;

Defendant's demurrer to indictment;

Defendant's motion, successfully made, in arrest of judgment for insufficiency of the indictment;

A judgment sustaining defendant's special plea in bar.

These proceedings are all defendant's acts before a verdict to prevent a trial, except the motion in arrest of judgment, which is defendant's act after a verdict against him to defeat a judgment on the verdict. These motions of defendant rest upon the want of jurisdiction of the court, the unconstitutionality of the statute, or some other lack of right to proceed to trial or to judgment on the verdict, the effect of all of which is to defeat the jeopardy. Mark this: It is not proposed to give the Government any appeal under any circumstances when the de-

defendant is acquitted for any error whatever committed by the court.

We can not give the Government an appeal or writ of error in any case where a judgment of reversal would put the defendant again in jeopardy, and this bill does not undertake to do so. It gives the Government an appeal only when the defendant has been successful in defeating his jeopardy by defeating the trial.

The Government takes the risks of all the mistakes of its prosecuting officers and of the trial judge in the trial, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial.

The defendant gets the benefit of all errors in the trial which are in his favor, and can challenge all errors in the trial which are against him. It is certainly not too much when he attacks the trial itself or the law under which it is conducted to give the people the right to a decision of their highest courts upon the validity of statutes made for their protection against crime.

On the other hand, there is no doubt that the expectation was that, except for a motion in arrest of judgment, the rulings to which the bill related would occur before a jury was sworn (see statement of Senator Bacon, 41 Cong. Rec. 2192). The clearest statement to such effect was made by Senator Patterson as follows (41 Cong. Rec. 2752):

I do not care how broad or indefinite or definite the definition of "jeopardy" may be[.] I maintain, whatever the definition is, that no jeopardy can attach in cases in which writs of error

will lie under the Senate bill, bills of exception and writs of error being, first—

From the decision or judgment quashing or setting aside an indictment.

That is, as a rule, before pleading. The motion to quash an indictment is, as a general rule, filed before the prisoner is required to plead guilty or not guilty. If the prisoner pleads guilty or pleads not guilty in order that the motion to quash may be heard and decided by the court, the plea of not guilty is set aside or held as not having been made.

Mr. SPOONER. And they ask leave of the court to withdraw it.

Mr. PATTERSON. And they ask leave to withdraw the plea of not guilty.

Mr. SPOONER. A request which is always granted.

Mr. PATTERSON. So that nothing that squints at jeopardy has existed up to the time the court has passed upon the motion to quash the indictment.

What is the next?

From the decision or judgment sustaining a demurrer to an indictment or any count thereof.

A demurrer is simply another form of a motion to quash. A demurrer simply reaches the insufficiency of the indictment to put the defendant upon his trial, and therefore it also is interposed before the defendant is required to plead. If he has pleaded before the demurrer can be heard and determined, the request will be made to withdraw the plea of the defendant until the demurrer has been heard and passed upon by the court.

This statement was made after Senator Rayner, the leading opponent of the bill, had raised a question as to what would happen if, at the end of testimony, the court *sua sponte* decided that the statute was unconstitutional or had been repealed (41 Cong. Rec. 2748-2749). Since the question was never precisely answered, it appears that the remarks just quoted were meant as an answer to that question. In view of the principle that the Criminal Appeals Act sets forth an "exceptional right \* \* \* given to the Government" and is therefore to be strictly construed (*United States v. Borden Co.*, 308 U.S. 188, 192; Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson & Kurland ed., 1951), pp. 321-322) we are not prepared to dispute the interpretation of the Act which has obtained since 1907.

**B. The Motion Here Involved Was Properly Treated As A Motion In Arrest of Judgment.**

Since we do not contend that we can rely on the demurrer or plea in bar aspects of the Criminal Appeals Act, the questions of appealability and the jurisdiction of this Court on direct appeal, in our view, turn upon the question of whether the motion here may properly be treated as a motion in arrest of judgment, and, if so, whether it is "based upon the invalidity or construction of the statute upon which the indictment or information is founded."

1. As indicated in our Jurisdictional Statement, we believe the present case *is* appealable to this Court under the "arresting a judgment" subdivision of the

Criminal Appeals Act. Appellee's motion (twice amended), which was granted by the trial court, purported to be—and was labeled—a motion in arrest of judgment and was submitted, pursuant to Rule 34, F.R. Crim. P., and the common law and statutory understanding as to the time for making such motions, "after \* \* \* finding of guilty." The court treated the motion as one in arrest of judgment, finding that the indictment "does not charge an offense" (A. 263).

The problem as to whether the order may properly be treated as one granting a motion in arrest of judgment arises from the fact that the Court, in granting appellee's motion, did not base its action wholly on the allegations of the indictment, but used as a partial predicate for its constitutional rulings the undisputed fact, which appeared from the evidence at trial, that appellee is a non-religious conscientious objector to participation in the Vietnam conflict.<sup>8</sup> We do not dispute the proposition that Congress, in the 1907 Act (and indeed in the 1942 amendments which gave a right of appeal to courts of appeal from orders granting motions in arrest not appealable to the Supreme Court), used the term in its common law sense which is in turn embodied in Rule 34, F. R. Crim. P. As

<sup>8</sup> The indictment, which was in the standard form, merely charged that appellee, on or about April 17, 1968, knowingly refused to obey the order of his local Selective Service board to submit to induction. That appellee claimed to be a conscientious objector of some kind was made clear in his memorandum in support of his pre-trial motion to dismiss the indictment; the memorandum, however, did not explain the non-religious or other specific nature of his conscientious objector beliefs. See *United States v. Sisson*, 294 F. Supp. 515, 519.

stated in Rule 34, a motion in arrest of judgment may be granted "if the indictment of information does not charge an offense or if the court was without jurisdiction of the offense charged." A motion in arrest of judgment is thus, in effect, a delayed demurrer and cannot reach defects in the sufficiency or reception of evidence or in the conduct of the trial. See *United States v. Green*, 350 U.S. 415; *United States v. Bramblett*, 348 U.S. 503. In *Green* three Justices dissented from the Court's consideration of the issues on the ground that, in order to qualify as a "decision arresting a judgment of conviction for insufficiency of the indictment," a district court may not (even in part) utilize facts not alleged in the indictment as an "independent ground" in support of its judgment (350 U.S. at 421). The majority of the Court in *Green* did not disagree on this point (differing only as to the nature of the ruling below). It said (*ibid.*):

On this appeal the record does not contain the evidence upon which the court acted. The indictment charges interference with commerce by extortion in the words of the Act's definition of that crime. *We rule only on the allegations of the indictment* and hold that the acts charged against appellees fall within the terms of the Act. \* \* \* [Emphasis added.]

The doctrine enunciated in *Green*, however, does not govern the situation here. The district court in this case did not purport, even in part, to render a judgment on the merits (akin to an acquittal) that the evidence was not sufficient to show that appellee committed the offense charged. Rather, the court

here merely used the fact of appellee's non-religious form of conscientious objection to a particular war as the circumstantial framework for its ruling that the indictment was constitutionally insufficient as applied to appellee. This Court has recognized that a stipulation of facts by the parties in a criminal case may properly be treated by the district court as supplementing the indictment (like a bill of particulars), so that a decision dismissing the charge, which utilizes the facts established by the stipulation, is nonetheless appealable to this Court under 18 U.S.C. 3731 where the basis for the decision is the invalidity or construction of the underlying statute. *United States v. Halseth*, 342 U.S. 277; see also *United States v. Fruehauf*, 365 U.S. 146. We see no reason why the same reasoning does not apply to the delayed demurrer represented by a motion in arrest of judgment. It is no doubt true, as the Second Circuit stated in *United States v. Zisblatt, supra* (discussed *supra*, pp. 18-19; 172 F.2d at 741-742),

that at common-law a motion in arrest of judgment raised no objections which did not appear "upon the face of the record." "No defect in evidence or improper conduct on the trial can be urged at this stage of the proceedings." The "face of the record" includes nothing more than the judgment roll; and indeed, the common-law knew nothing of the evidence taken at trial until the Statute of Westminster allowed exceptions to be sealed and a bill of exceptions to be brought up with the roll on writ of error. For this reason it was held before the Rules that upon appeal any ruling whose validity de-

pended upon the evidence taken at the trial, was not reviewable by motion in arrest; and the Rules have made no change. \* \* \*

We, therefore, have no quarrel with the holding in *Zisblatt* that a ruling on the statute of limitations, which involved neither the validity of the indictment as such, nor the jurisdiction of the court, could not be treated as action on a motion in arrest of judgment. What we say, however, is that, while the government's right of appeal is limited to the class of cases recognized as falling within a motion in arrest of judgment, there is no reason at this time to read into that class of cases all the niceties of what might or might not have been included in the judgment roll at common law. As noted above, this Court in *United States v. Halseth*, 342 U.S. 277, did not read the Act in such a narrow fashion since the stipulation of facts on which the ruling was based there would not have been part of the judgment roll at common law. In that case the Court recognized that a decision before jeopardy on stipulated facts represented the kind of decision which the Criminal Appeals Act was intended to reach—a decision on a question of law which involved the validity or construction of a statute. That is the situation here.

The government accepted the specific facts relied on as to the nature of appellee's beliefs so that, as the district court noted, the entire case "in substance \* \* \* arises upon an agreed statement of facts" (A. 250). In these circumstances, to construe the Criminal Appeals Act as precluding appeal of the decision below would unwarrantedly exalt form over substance. There

is no genuine difference between this case and one in which the nature of appellee's conscientious objector views would be set forth in the indictment itself, or formally stipulated to on a motion to dismiss. All such cases present the type of situation for which the Criminal Appeals Act was designed—a decision on the constitutionality of a statute generally. The instant decision is therefore properly treated, in accordance with the intent of the parties and the trial judge, as "arresting a judgment of conviction for insufficiency of the indictment" and is thus appealable directly to this Court under the Criminal Appeals Act.

2. The Criminal Appeals Act provides, in both the demurrer and arrest of judgment clauses, for appeal to this Court from a decision holding an indictment invalid "based upon the invalidity or construction of the statute upon which the indictment is founded." The indictment here alleged a violation of Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 462(a)), in that the appellee knowingly refused to obey an order of his local Selective Service board to submit to induction. On the indictment, as amplified by the agreed facts, *i.e.*, that appellee was a sincere non-religious objector to the Vietnam conflict, the district court ruled that Congress had no authority to require him to report for induction into the Armed Forces when such service could include duty in Vietnam. This part of the opinion is

thus clearly a construction of Section 12(a), the statutory provision upon which the indictment was founded.

The district court also held that Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(j)), as applied to appellee, violated the Establishment Clause of the First Amendment in that it unreasonably discriminates between religious and non-religious conscientious objectors. Strictly construed, the indictment was not "founded" on Section 6(j). However, since it was implicit in the indictment that the order which appellee disobeyed was a *lawful* order, the validity of appellee's classification was an issue subsumed in the charge, and the court's holding that the conscientious objector exemption provision is invalid amounts to a ruling as to the invalidity of a statute "upon which the indictment is founded." Compare *United States v. Borden Co.*, 308 U.S. 188, 194-195; *United States v. Kapp*, 302 U.S. 214, 216. Moreover, since the district court was not undertaking to invalidate all of Section 6(j) insofar as it applied to those persons exempted by its terms, the effect of the court's decision was to hold that the federal judiciary could not constitutionally undertake to punish a person who had unlawfully been denied the exemption given to others. In thus holding that the court could not, on the agreed facts, punish the appellee for refusal to submit to induction, the court was again con-

struing Section 12(a), the statute on which the indictment was founded.<sup>9</sup>

II. A SELECTIVE CONSCIENTIOUS OBJECTOR HAS NO CONSTITUTIONAL RIGHT TO EXEMPTION FROM COMBATANT SERVICE IN VIETNAM.

The district court held that appellee could not be lawfully conscripted in the Armed Forces of the United States because there was a substantial possibility that he would be sent to serve in the Vietnam conflict to which he is sincerely and conscientiously opposed on non-religious grounds. This ruling does not depend on any finding that appellee is conscientiously opposed to war in any form, whether on religious or non-religious grounds, but applies to any person who conscientiously opposes the particular decision of the United States government that it is necessary to send conscripted persons to fight in Vietnam. It does not depend on any congressional judgment that there is no need for military service by persons who sincerely oppose military action in a particular area of operations. No claim is made—and manifestly there can be none—that Congress has now, or has ever, undertaken to exempt from general conscription persons who sin-

<sup>9</sup> If the Court should agree that the motion here granted was one in arrest of judgment, but should hold that it did not represent a construction of the statute on which the indictment is founded, the decision of the district court is still appealable, but the appeal would lie in the court of appeals. Whatever the scope of the 1942 amendments to the Criminal Appeals Act, it is clear that any order granting a motion in arrest of judgment which is not appealable to the Supreme Court is appealable to the appropriate court of appeals. See 18 U.S.C. 3731.

cerely oppose the decision to fight in a particular area at a particular time. Rather, the district court, on the basis of its own determination that there is not a "national need for combat service" from persons who sincerely oppose the conflict in Vietnam, has held that Congress is without constitutional power to require the induction of appellee into the Armed Forces at a time when he might be sent to that country. The decision below thus rests, not on any finding of unconstitutional discrimination by Congress, but on a determination by the district court that, at this time and in relation to the Vietnam conflict, the dictates of individual conscience are qualitatively superior to "the country's present need" for combatant service from persons who, as a matter of individual conscience, disagree with the present foreign policy of the United States. The decision is thus in many respects unique, both in its assumption as to the proper functions of courts and in its elevation of the role of individual conscience to a preeminent place as regards obedience to the laws of the nation.

1. As noted in the Jurisdictional Statement, there is a threshold question here as to whether appellee's objections to the Vietnam conflict are even a proper issue in this case. Appellee is not being prosecuted for failure to obey an order to go to Vietnam; he is being prosecuted for failure to submit to induction into the Armed Forces. Appellee's induction would not immediately occasion his being sent to Vietnam, and would not necessarily result in his ever being sent there. Thus, the court undertook to excuse a deliber-

ate violation of law on the basis of events which may or may not occur in the future. Such a speculative situation does not provide a proper basis for constitutional adjudication.

In *United States v. Raines*, 362 U.S. 17, where a district court had held an act of Congress invalid because it was susceptible of an interpretation that was constitutionally impermissible, this Court reversed. It quoted with approval the language in *Liverpool, N.Y. & P. S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, that the Court was bound by two rules: "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (*id.* at 21). See, e.g., *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (Justice Brandeis, concurring); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569. As to the specific matter here involved, see *United States v. Mitchell*, 369 F. 2d 323 (C.A. 2), certiorari denied, 386 U.S. 972. There the Second Circuit held that the defendant's challenge to the legality of our Vietnam involvement provided no defense to his criminal prosecution for failure to report for induction into the Armed Forces, since the congressional authority "to raise and support armies" was "quite distinct" from whatever use might be made by the President of conscripted troops (369 F. 2d at 324). A similar analysis should have been applied here so as to preclude judicial consideration of appellee's contentions.

2. Assuming that the question is reached, we think it clear that the district court went far beyond the limits of judicial power in undertaking to decide, on the basis of its balancing of the considerations it deemed applicable, whether an individual's conscientious objection to a particular war—on either religious or non-religious grounds—gave him a constitutional right to disobey an act of Congress.

The district court, although it declined to treat the issue as authoritatively settled, assumed "that a conscientious objector, religious or otherwise, may be conscripted for some kinds of service in peace or in war" (A. 256-257). The court further assumed "that in time of declared war or in the defense of the homeland against invasion, all persons may be conscripted even for combat service" (A. 257).<sup>10</sup> It ruled that the question of constitutional objection to a particular

<sup>10</sup> On the narrow review which is available under 18 U.S.C. 3731, we do not think the validity of these underlying assumptions—on which the actual holding does not rest—is before the Court. See *United States v. Automobile Workers*, 352 U.S. 567, 589-593. Cf. *United States v. Fancher*, pending on direct appeal, No. 900, this Term, where the construction of a statute appears to us to have been influenced by doubts as to constitutionality if read literally and where, therefore, we do deem the constitutional issue to be before the Court.

In any event, this Court has recently recognized that Congress may lawfully conscript for military service either in time of peace or war. *United States v. O'Brien*, 391 U.S. 367, 377. See also *Selective Draft Law Cases*, 245 U.S. 366; *Hamilton v. Regents*, 293 U.S. 245; *United States v. Henderson*, 180 F. 2d 711 (C.A. 7); *Etcheverry v. United States*, 320 F. 2d 873 (C.A. 9), certiorari denied, 375 U.S. 930; *Warren v. United States*, 177 F. 2d 596, 599 (C.A. 10), certiorari denied, 338 U.S. 947.

war "is an area in which competing claims must be explored, examined, and marshalled with reference to the Constitution as a whole" (A. 257), that "some sincere objections have greater constitutional magnitude than others" (A. 261), and that the courts are under a duty to discern degrees of constitutional magnitude when such claims are made (*ibid.*). It thus undertook to decide whether a specific objection to participation in a particular area of conflict should or should not be given constitutional protection, whether the claim is based on religious grounds or not.

We submit that the constitutional grant of power to Congress to raise and maintain armies (Art. I, Sec. 8) is not properly subject to the "balancing" approach applied in the instant case. The authority to determine whether or not this country needs a particular individual's services in the Armed Forces is vested in the Congress, not the courts. Of course, in determining who shall be exempt from combatant service, Congress may not invidiously discriminate against any class or person or violate individual rights guaranteed by the Constitution.<sup>11</sup> *E.g., Speiser v. Randall*, 357 U.S. 513. There is, however, no constitutional right to obey only those laws with which one agrees. It is not the province of courts to decide whether a particular law or particular foreign policy is good or bad, or whether there is or is not any need for specified numbers of men in a particular place at a certain time. This de-

<sup>11</sup> Contrary to appellee's allegation (Motion to Affirm, p. 8), nowhere in our Jurisdictional Statement have we indicated that there could not be judicial review of an arbitrary action in this regard.

termination is the very essence of a "political question," unsuited for judicial scrutiny. See, e.g., *Baker v. Carr*, 369 U.S. 186, 217; *Johnson v. Eisentrager*, 339 U.S. 763, 788-789; *Ludecke v. Watkins*, 355 U.S. 160, 170; *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111; cf. *Powell v. McCormack*, 395 U.S. 486, 518-549. As was said in *Pauling v. McNamara*, 331 F. 2d 796, 799 (C.A.D.C.):

In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives. \* \* \* Our entire System of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the Congress and President, even were we so bold as to assume that we can make better decisions on such issues.

Yet, under the balancing approach of the court below, the judiciary would of necessity have to decide, as the district court did here, whether the United States does or does not need to take into the Armed Forces men who do not agree with its foreign policy of the moment. While admitting the right of Congress to draft appellee for combatant service in time of national necessity, the court below has substituted its opinion for that of the legislative and executive branches as to what constitutes national need. It has determined that sufficient necessity has not been demonstrated for Congress to require combatant service at the present time from one who is personally—albeit sincerely—opposed to fighting in Vietnam. In

our view, a court has no power under the Constitution to make that determination. Judges are not the persons charged with the responsibility for determining the national need for military manpower. They should not be called upon to "balance" the magnitude of an individual's objection, however conscientious, and the needs of the nation. They are required to construe and apply legislation in this regard as enacted by Congress. But Congress has determined to excuse from combatant service only those who are "opposed to participation in war in any form" (50 U.S.C. App. (Supp. IV) 456(j)). That legislative judgment is not only entitled to respect; it establishes the policy to be followed in this matter, no less by judges than by others, unless that policy runs afoul of some constitutional command.<sup>12</sup>

3. It is of course true that, under our Constitution, Congress does not have untrammeled freedom of action, even in the exercise of its specifically granted power "[t]o raise and support Armies" (Art. I, Sec. 8). Congress may not act in a way which deprives

<sup>12</sup> In its decision in *United States v. Seeger*, 380 U.S. 163, on which appellee appears to place considerable reliance (see Motion to Affirm, pp. 6, 9), this Court repeatedly referred to the notion of opposition to "participation in war in any form" as a statutorily necessary and constitutionally appropriate prerequisite to an allowable conscientious objector claim (380 U.S. at 165, 171, 172). Thus, while the question was not there squarely presented, the Court did in *Seeger* give at least implicit recognition to validity of the position here urged—that Congress is not constitutionally required to take account of "selective" conscientious objection to particular wars. See generally Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355, 1370 (1968).

a person of religious freedom or establishes a religion in violation of the First Amendment. Nor may it arbitrarily discriminate between persons or classes in violation of the due process clause of the Fifth Amendment. It is our position that Congress has done neither in limiting the scope of Section 6(j) to those opposed to war "in any form."

a. So far as the "selective" conscientious objector is concerned, Congress has made no distinction between religious and non-religious motivations. It has not exempted from the duty to submit to induction into the Armed Forces those persons who, because of their religious convictions, deem a particular war to be morally wrong. Thus, as to the question which this case presents—the right to require service from one who is morally opposed to a particular conflict—there is no basis for a claim that Congress has shown a preference for religious against non-religious moral beliefs. The Establishment Clause of the First Amendment thus has no bearing on the issue here involved.

b. Nor can it reasonably be maintained that, in deciding to require service of one who might be sent to an area where in conscience he does not believe American troops should be, Congress has violated the freedom of religion of a Selective Service registrant like appellee. It is settled that, as the decision of the court below recognizes, however untrammeled may be the freedom to believe, religious freedom does not require that religious scruples be recognized as justifying disobedience to a valid law. *Cantwell v. Connecticut*, 310 U.S. 296, 303-304; *Jacobson v. Massa-*

*chusetts*, 197 U.S. 11, 29. As discussed above, the district court endeavored to bring the First Amendment into the case by deciding that it had the right to balance the magnitude of the beliefs held against what it perceived to be the need of the nation for manpower. If that balancing approach is wrong—and we think it clearly is as to the issue here—no First Amendment question is presented.

In *Hamilton v. Regents*, 293 U.S. 245, 268, a group of religious persons sought exemption from compulsory military training at the University of California. Their claim was rejected. Quoting with approval the language in *United States v. Macintosh*, 283 U.S. 605, 623, this Court observed (293 U.S. at 264):

The conscientious objector is relieved from the obligations to bear arms in obedience to no constitutional provisions, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. \* \* \* The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. \* \* \* [T]he war powers \* \* \* include \* \* \* the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. \* \* \*

In a concurring opinion, Justice Cardozo, joined by Justices Brandeis and Stone, recognized that an extension of the conscientious objector's liberty might

lead to wholly incongruous situations (293 U.S. at 268):

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.<sup>12</sup>

See also *In Re Summers*, 325 U.S. 561. Religious conviction, no matter how sincere, is not violated because a person is punished for doing that which Congress has validly decreed should not be done.

At all events, appellee does not base his objection to military service on any religious beliefs. It is difficult, therefore, to perceive how his rights under the

<sup>12</sup> In like vein, Circuit Judge Augustus Hand stated for the court of appeals, in *United States v. Kauten*, 133 F. 2d 703, 708 (C.A. 2), that: "There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

Free Exercise Clause of the First Amendment could be impaired as a result of his being conscripted. Viewing the concept of religion in the broadest scope recognized in this court's decisions (see, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495; *Abington School District v. Schempp*, 374 U.S. 204, 222-223), appellee is nonetheless not in a position to claim protection from the First Amendment for his distinctly and designedly non-religious opposition to participation in the Vietnam conflict.

Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies would that provision be useful to appellee.<sup>24</sup> And if that provision is given such a sweeping scope, it would of necessity extend beyond the Selective Service context and reach all matters as to which an individual claimed to be conscientiously opposed (see *infra*, pp.

<sup>24</sup> Language purporting to protect a general "right of conscience" was in fact included in early drafts of the Bill of Rights, but was eliminated from the provisions finally adopted and submitted to the States for ratification. See Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 416-417 (1952). Nonetheless, our nation's treatment of conscientious objectors, as formulated by Congress, has historically been enlightened and compassionate, and actually dates back to colonial times. In order to guard against the possibility of widespread abuse of this policy, however, Congress has necessarily placed certain limitations on the range of circumstances within which opposition to war will be taken into account. Appellee's situation—as a non-religious, selective objector—is, for understandable reasons, not included in the ambit of conscientious objection given legislative recognition. Nor was Congress, for the reasons developed earlier, required to do so as a constitutional matter.

48-49). See general Comment, 34 U. Chi. L. Rev. 79, 102 (1966). Such a construction of the First Amendment is without precedent. It would be wholly destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process. To the extent, then, that the district court based its decision to the contrary on First Amendment grounds, that decision is plainly an erroneous one.

c. There remains the question whether it is arbitrary for Congress, in granting exemption from combatant service to discriminate between persons who oppose all wars and persons who oppose a particular war.<sup>15</sup> That such a distinction has a rational basis seems self-evident. Opposition to a particular war, no matter how sincerely and morally motivated, necessarily involves a political judgment. It represents the individual's personal conclusion that the policy adopted by the duly elected representatives of his government is wrong at a certain time in relation to a particular area of operations. Those who oppose participation in combat in any form do not make the same type of immediate political judgment. Their rejection of war in any form is based, not on the political judgment of the moment, but on inherent characteristics of military combat, on beliefs that it is wrong to kill for any purpose at any time. Accord-

<sup>15</sup> As noted above, as to the "selective" conscientious objector, no distinction is drawn between those whose beliefs stem from religious or non-religious grounds. For that reason, the only classification relevant to this discussion is the distinction between those who oppose all wars and those who oppose a particular war on grounds of conscience.

ingly, Congress may validly conclude that there is a qualitative difference between persons whose beliefs cause them to oppose participation in all wars and those who wish to reserve the right to choose the wars in which they will fight. Except for the court below, all the courts which have examined the question have determined that Congress may validly draw a distinction between those who oppose all wars and those whose objection is only to a particular war. *Negre v. United States*, No. 24067 (C.A. 9), decided November 7, 1969; *United States v. Spiro*, 384 F. 2d 159 (C.A. 3), certiorari denied, 390 U.S. 956; *Clay v. United States*, 397 F. 2d 901 (C.A. 5), vacated and remanded on other grounds, 394 U.S. 310; *United States v. Hartman*, 209 F. 2d 366; 370-371 (C.A. 2); *Taffs v. United States*, 208 F. 2d 329, 331 (C.A. 8); *United States v. Kurki*, 255 F. Supp. 161, 165, affirmed, 384 F. 2d 905; see also *Sicurella v. United States*, 348 U.S. 385. The district court took the position that the "magnitude" of an individual's conscientious objection is not appreciably lessened because his beliefs relate to a particular war. It is not, however, the magnitude but the nature of the objection which gives rise to the distinction. Congress could reasonably conclude that a government cannot allow political dissent to excuse a person from the duties imposed by the government on all persons in the same class.

Indeed, appellee's situation is little different from that of a person who—sincerely and conscientiously—opposes any number of governmental policies for political reasons. For example, some citizens might genuinely

object to a requirement of open access to housing without regard to race. But that hardly means that their views should prevail over national policy in this regard, and justify their non-compliance with such a law. Similar examples that might be given are legion, and do not differ significantly from the situation here at issue. The point, in short, is that if "selective" conscientious objection to participation in combatant service, *i.e.*, in a particular war, is judicially allowed, there is no logical stopping place insofar as persons who oppose other governmental policies are concerned. This analysis confirms both the soundness and the wisdom of the traditional application of the "political question" doctrine by the courts to such matters.<sup>16</sup> That is the approach the district court should have followed here.

<sup>16</sup> It is interesting and instructive to note the reasons on which a majority of the so-called Marshall Commission which studied the Selective Service laws several years ago based its opposition to statutory recognition of a special status for the "selective" conscientious objector. See *Report of the National Advisory Commission on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve?*, pp. 48-51 (1967). Concluding that "the status of conscientious objection can properly be applied only to those who are opposed to all killing of human beings under any circumstances," the Commission stated: "It is one thing to deal in law with a person who believes he is responding to a moral imperative outside of himself when he opposes all killing. It is another to accord a special status to a person who believes there is a moral imperative which tells him he can kill under some circumstances and not kill under others" (*id.* at 50). Other points mentioned by the commission include the following: 1) "[S]o-called selective pacifism is essentially a political question of support or non-support of a war and cannot be judged in terms of special moral imperatives"; such "[p]olitical opposition to a particular

III. THE DISTRICT COURT ACTED GRATUITOUSLY IN RULING  
THAT SECTION 6(j) INVALIDLY DISCRIMINATES BETWEEN  
RELIGIOUS AND NON-RELIGIOUS CONSCIENTIOUS OBJECTORS

As appears from the Statement, appellee, both in his motion to dismiss before trial and in his motion in arrest of judgment after trial, claimed that his moral objections to the Vietnam conflict were entitled to constitutional protection. He has never claimed to be opposed to participation in war in any form. Nor do we understand the decision below to treat appellee as a conscientious objector to war in any form. Rather, the district court found that a sincere objection to a particular war is a conviction commensurate in magnitude, as a constitutional matter, to a sincere objection to all war. It then went on to rule that insofar as Section 6(j) discriminates between religious and non-religious sincere objectors, the statute violates the Establishment Clause of the First Amendment. In so doing, the district court has reached out

“war” is more properly “expressed through recognized democratic processes” and is entitled to no exemption from decisions reached through those processes; 2) “[L]egal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government; the distinction is dim between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to payment of a particular tax”; 3) Allowing “the selective pacifist to avoid combat service by performing noncombatant service in support of a war which he had theoretically concluded to be unjust” (which would be the apparent result of the decision below here) is unjustifiable; and 4) “[L]egal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces” (*id.* at 50-51).

and decided an issue which was not necessarily subject to adjudication in this case, and which it did not need to consider in order to resolve the instant controversy.

The question whether Congress may validly discriminate between religious and non-religious conscientious objectors is not presented here because, as discussed above, Congress in enacting Section 6(j) has not granted any exemption to the "selective" conscientious objector, religious or non-religious. It has provided for the granting of an exemption only to those who conscientiously oppose participation in all wars. Since appellee does not oppose all wars he would not be entitled to exemption under Section 6(j), whether or not his beliefs stemmed from religious conviction. As to appellee, therefore, the only issue of discrimination in Section 6(j) which is presented is that already discussed, *i.e.*, whether Congress may constitutionally distinguish between those who conscientiously oppose all wars and those who conscientiously oppose a particular war.

Whether Congress may constitutionally grant exemptions to persons whose objection to war in any form stems from religious conviction and not to persons whose similar general objection has non-religious roots is thus not involved here. That issue is pending before this Court in *Welsh v. United States*, No. 76, this Term, in which certiorari was granted on October 13, 1969, and which will be argued along with this case (see A. 268), and also in *McQueary v. United States*, No. 88 Misc., this Term, and *Vaughn v. United States*, No. 35 Misc., this Term, which are pending on

petitions for writs of certiorari. However it is ultimately decided, its resolution will not aid appellee, the propriety of whose criminal conviction depends upon a ruling as to whether "selective" conscientious objection to a particular war is entitled to constitutional protection without a statutory base. The district court should therefore not have undertaken to decide in this case whether Congress could constitutionally discriminate, as it has in Section 6(j), between religious and non-religious objectors to participation in all wars. As this Court said in *United States v. Raines*, 362 U.S. 17, 21, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." See also *George v. United States*, 196 F. 2d 445, 452 (C.A. 9). Since no "selective" objector to war—religious or otherwise—is entitled to exemption under Section 6(j), the validity of Section 6(j) in relation to one who conscientiously opposes all wars on non-religious grounds should not be determined in this case.<sup>17</sup>

<sup>17</sup> We recognize that appellee sought to raise several questions in his Motion to Affirm in addition to those presented in the government's Jurisdictional Statement. Those questions, *inter alia*, relate to whether Congress can constitutionally conscript manpower for the military in peacetime and to the legality of the United States' participation in the Vietnam conflict. As to the former, the district court assumed that Congress had such power, and its assumption in this regard is supported by considerable authority. With respect to the latter, the court below declined to decide the issue, as has this Court on several

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and that the case should be remanded to the district court with directions to enter judgment on the verdict.

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occasions in the recent past. *E.g.*, *Luftig v. McNamara*, 373 F. 2d 664 (C.A.D.C.), certiorari denied, 387 U.S. 945; *Mora v. McNamara*, 387 F. 2d 862 (C.A.D.C.), certiorari denied, 389 U.S. 934. Appellee's further contention that, if the legality of American participation in the Vietnam conflict is not justiciable, then the district courts have no jurisdiction over criminal prosecutions where the alleged illegality of that involvement is relied upon as a defense is, in our view, without substance. Appellee is entitled to acquittal only if his Selective Service classification was improper; in order to show that, he must demonstrate that the statutory scheme pursuant to which his conscientious objector claim was rejected is invalid. That issue is certainly a justiciable one, and one that has no direct relation to the question whether our military involvement in Vietnam is a matter that the courts can consider.